APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.3555(e) of the Commission's Rules, National Television Ownership Rule	)	MB Docket No. 17-318
	)	
	)	
	)	

COMMENTS OF NEXSTAR BROADCASTING, INC.

Richard J. Bodorff
Eve Klindera Reed
Gregory L. Masters
Shawn Donovan
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
202.719.7000

Elizabeth Ryder
Executive Vice President & General Counsel
Nexstar Broadcasting, Inc.
545 E. John Carpenter Freeway
Suite 700
Irving, TX 75062

Counsel for Nexstar Broadcasting, Inc.

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I. INTRODUCTION.

Nexstar Broadcasting, Inc. hereby submits these comments in response to the Federal Communications Commission's ("Commission" or "FCC") Notice of Proposed Rulemaking reviewing its rule limiting national television audience reach, some version of which has been in effect for more than three-quarters of a century.[1] The rule, as currently in effect, prevents an entity from owning television stations that, in the aggregate, reach 39 percent or more of all U.S. television households; provided that in making the calculation, UHF television stations are attributed with only 50 percent of the television households in the market.[2] Nexstar agrees with the Commission that it has authority to modify or eliminate the national cap; and, as shown herein, it is abundantly clear that repeal is long overdue.

Today, television broadcasting is one small cog in a sea of ever-increasing video competition from a multiplicity of alternative sources for programming and information. However, in this vast competitive sea, television broadcasters alone are subject to an arbitrary

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[1] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Notice of Proposed Rulemaking, MB Docket No. 17-318, FCC 17-169 (Dec. 18, 2017) ("*NPRM*").

[2] *See* 47 C.F.R. §75.3555(e) (the national cap rule or national cap).

restriction on the number of viewers they are permitted to reach with their programming. Indeed, the breadth of diversity and competition present in today's media market alone undermines any justification for retaining any limitation on national television audience reach. Further, as the Commission and the courts previously determined, neither competition nor diversity support a national cap rule, and there is no reason for disturbing these conclusions today.

Localism also does not demand retention of a national cap because the number of viewers a television broadcaster reaches nationwide has no correlation whatsoever to how a television broadcaster serves its viewers in individual markets. Given the public interest obligations and natural incentives of all broadcasters to consider and respond to the needs and interests of the local communities that they serve, elimination of the national cap will have no effect on localism. Moreover, the "preservation of localism" that underpins the national cap limits has historically been considered to be with respect to balance the power between the national networks and their local affiliates, (i.e., negotiating leverage between networks and their affiliates) not ensuring broadcasters serve their communities.[3]

As the NPRM acknowledges, "the video marketplace has changed considerably . . . " and television broadcasters now face hurdles never contemplated at the adoption of the national cap in 1941 (or even when last modified in 2004), including (but not limited to) online alternatives to video distribution, direct to consumer video distribution, reverse compensation payable to the television networks, consolidation of broadcast and cable network ownership, and consolidation

[3] *NPRM*, ¶ 12. Other rules imposed on television broadcasters more appropriately relate to "localism" as the service to the community. *See e.g.,* 47 C.F.R. § 73.3526 (e)(11)(i) (requiring broadcasters to document their treatment of community issues in their public inspection files); *see also* 47 U.S.C. § 309(a) (requiring the Commission to consider whether the public interest would be served by grant of a renewal application).

of the MVPD distribution system.[4] Now, more than ever, television broadcasters must be permitted to achieve the scale and scope of operations necessary to compete in the current vastly fragmented, distribution system-dominated video marketplace. Elimination of the national cap in its entirety will foster increased competition among broadcasters, as well as provide broadcasters with opportunities to find innovative ways to serve audiences, thereby promoting competition, diversity, and localism. Accordingly, Nexstar urges the Commission to eliminate the national cap rule in its entirety.

II. HISTORY OF THE NATIONAL CAP.

The national cap has its origins in television ownership restrictions that date back to 1941 when, in "the earliest days of television," the FCC placed a three-station limit on the number of stations that a single company could own, operate, or control nationwide.[5] In 1954, the Commission increased the national limit to seven stations, and then raised it to twelve stations in 1984.[6] At the same time it adopted the twelve-station national limit, the Commission observed that in the three decades since it had examined the restriction on national television station ownership, the broadcast industry had "experienced an enormous transformation" and the "mass media market in toto likewise ha[d] witnessed explosive growth and change."[7] As a result, the Commission

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[4] *NPRM*, ¶ 11.

[5] *Id.*, ¶ 2 (citing *Broadcast Services Other Than Standard Broadcast*, 6 Fed. Reg. 2282, 2284-85 (May 6, 1941).

[6] *Id.* (citing *Amendment of §3.636 of the Commission's Rules and Regulations Relating to Multiple Ownership of Television Broadcast Stations*, 43 FCC 2797, 2798, ¶ 3 (1954); *Amendment of Section 73.3555 [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations*, Report and Order, 100 FCC 2d 17, 54-56, ¶¶ 108-12 (1984) ("*1984 Multiple Ownership Order*"), *recon. granted in part*, Memorandum Opinion and Order, 100 FCC 2d 74 (1985) ("*1985 UHF Discount Order*"), *recon. dismissed*, 5 FCC Rcd 5338 (1990)).

[7] *1984 Multiple Ownership Order*, 100 FCC 2d at 18, ¶ 4.

determined that a national limit on broadcast station ownership was no longer needed, and only delayed its complete repeal as a safeguard against unexpected changes in the marketplace that would warrant continued regulation.[8]

On reconsideration, the Commission retained the twelve-station limit and added a separate national audience reach cap of 25 percent.[9] The 25 percent limit was, as the 39 percent limit is today, based upon a television group owner's theoretical potential audience reach, rather than on the percentage of viewers who actually watch a station's programming.[10] Despite intervening technological developments, the Commission retained the national cap rule unchanged for more than a decade, until the Telecommunications Act of 1996 directed the agency to eliminate the twelve-station limit and increase the 25 percent national cap to 35 percent.[11]

Also recognizing that the FCC failed on its own to ensure that its rules kept up with the dynamic communications marketplace, Congress imposed an obligation upon the Commission to review all of its media ownership rules on a biennial (now quadrennial) basis.[12] In the first such

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[8] *Id.* at 18, ¶ 5.

[9] Congress subsequently blocked the FCC from allowing the limit to sunset entirely, *See* Second Supplemental Appropriations Act, Pub. L. No. 98-396, § 304, 98 Stat. 1369, 1423 (1984), and several parties also filed petitions for reconsideration. *See NPRM*, ¶ 2 (citing *1985 UHF Discount Order*, 100 FCC 2d at 87, 90, 97, ¶¶ 30, 38, 50). At that time, the Commission also adopted the UHF discount. *Id.*

[10] *1985 UHF Discount Order*, 100 FCC 2d at 76, ¶ 3; 47 C.F.R. §73.3555(e).

[11] *NPRM*, ¶ 2 (citing Telecommunications Act of 1996, Pub. L. No. 104-04, §202(c)(1), 110 Stat. 56, 111 (1996) ("1996 Act"); *Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations)*, Order, 11 FCC Rcd 12374, 12374-75, ¶¶ 2-3 (1996)).

[12] *Id.*

review, the Commission reaffirmed the 35 percent national cap.[13] However, the United States Court of Appeals for the D.C. Circuit found this decision to be arbitrary and capricious because "the Commission had failed to demonstrate that the 35 percent limitation advanced localism, diversity, or competition."[14]

The FCC subsequently abandoned diversity and competition as purported rationales for a national television audience reach limitation, confirming the D.C. Circuit's suspicion that there was no evidence to support the idea that a cap was needed to serve either of those interests.[15] In the 2002 Biennial Review Order, the Commission determined that only localism concerns justified retention of some national television ownership limit, adopting a rule increasing the then 35 percent cap to 45 percent.[16]

Congress again stepped in, directing the FCC to "modify its rules to set the national cap at 39 percent of national television households."[17] At the same time, Congress specified that the biennial review of the Commission's ownership rules required by the 1996 Act should occur on a

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[13] *Id.* (citing *1998 Biennial Review Order – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Biennial Review Report, 15 FCC Rcd 11058, 11072-75, ¶¶ 25-30 (2000) ("*1998 Biennial Review Order*")).

[14] *Id.*, ¶ 3 (citing *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1040-49, *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002)). The D.C. Circuit also found the decision to retain the 35% national audience reach cap to violate Section 202(h) of the 1996 Act.

[15] *2002 Biennial Review Order – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13818-25, 13826-28, ¶¶ 509-28, 534-37 (2003) (subsequent history omitted) ("*2002 Biennial Review Order*").

[16] *NPRM*, ¶ 3 (citing *2002 Biennial Review Order*, 13817, 13842, ¶¶ 501, 578)).

[17] *Id.* ¶ 4 (quoting Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, §629, 118 Stat. 3, 99-100 (2004)).

quadrennial, rather than biennial, basis, and should not include consideration of "any rule relating to the 39 percent national audience reach limitation."[18]

In 2016, the Commission eliminated the UHF discount for calculating compliance with the national cap rule.[19] In so doing, the Commission concluded that it has statutory authority to modify or eliminate both the UHF discount and the rule. Specifically, the Commission determined that while Congress had directed the agency to set the national cap at 39 percent in 2004, it left intact the Commission's general authority to revise or eliminate all of the rules adopted under the Communications Act of 1934, as amended, and to revisit its rules if the public interest so warranted.[20] The Commission subsequently reinstated the UHF discount, finding that it had been arbitrary and capricious to remove the discount without considering the propriety of the rule itself.[21] This NPRM followed.

III. THE COMMISSION POSSESSES STATUTORY AUTHORITY TO MODIFY OR ELIMINATE THE NATIONAL CAP.

As the Commission determined in 2016, it has authority to modify or eliminate the national cap. Moreover, the courts have confirmed that the Commission is affirmatively required by the Administrative Procedure Act to amend or eliminate its rules when, as is the case here, a significant

[18] *Id.* (citing CAA, § 629(3)).

[19] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Report and Order, 31 FCC Rcd 10213 (2016) ("*UHF Discount Elimination Order*"). Petitions for review of both the *UHF Discount Elimination Order* and the *UHF Discount Reinstatement Order* (discussed below) are pending in the United States Court of Appeals for the D.C. Circuit.

[20] *NPRM*, ¶ 7; *see UHF Discount Elimination Order*, 31 FCC Rcd at 10220-24, ¶¶ 17-24.

[21] *Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule*, Order on Reconsideration, 32 FCC Rcd 3390 (2017) ("*UHF Discount Reinstatement Order*").

basis underlying such rule decision has been removed. Further, the 2004 Consolidated Appropriations Act ("CAA") in no way stripped the Commission of authority to revise or eliminate the national cap.

A. The Communications Act Provides the Commission with Authority to Modify or Eliminate the National Cap.

The Communications Act empowers the Commission to modify or eliminate its rules, including the national cap rule. Section 154(i) of the Act authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[22] In addition, Section 303(r) provides that the FCC may "[m]ake such rules and regulations . . . not inconsistent with this law, as may be necessary to carry out the provisions of this Act . . . ."[23] As the Commission concluded in 2016, these provisions give it "statutory authority to revisit its own rules and revise or eliminate them when it concludes such action is appropriate."[24]

In fact, the Commission has more than mere authority to update its rules – it is legally obligated to do so. Under the Administrative Procedure Act, it is arbitrary and capricious for an agency to retain, as the FCC has here, rules that have long outlived their usefulness, and courts have consistently held that federal agencies have an affirmative obligation to reexamine their rules

[22] 47 U.S.C. §154(i).

[23] *Id.* § 303(r); *see Sports Blackout Rule*, Report and Order, 29 FCC Rcd 12053, 12058, ¶ 9 (2014) (finding that, despite a statute stating that the FCC "shall" apply the sports blackout rule to direct broadcast satellite and online video service, the Commission could repeal the rule under its general rulemaking power to review, modify, or repeal rules as it deems appropriate).

[24] *UHF Discount Elimination Order*, 31 FCC Rcd at 10223, ¶ 21 (citing 47 U.S.C. §§154(i), 303(r)).

over time.[25] For example, in *Bechtel v. FCC*, the court found that changes in circumstances may impose upon the Commission an obligation to reconsider a policy or explain its failure to do so.[26] In the rulemaking context, "it is settled law that an agency may be forced to reexamine its approach 'if a significant factual predicate of a prior decision has been removed."'[27] Indeed, as the Supreme Court observed nearly half a century ago, "the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."[28]

In the 14 years since Congress set the national cap at 39 percent, the media environment has undergone a dramatic transformation brought about by the emergence of online media and other video programming platforms. This transformation is precisely the sort of development that triggers the Commission's obligation to reconsider its regulatory approach.

B. The CAA Does Not Prevent the FCC from Modifying or Eliminating the National Cap Rule.

The CAA did not alter the Commission's authority under the Communications Act (or its

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[25] *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. Atchinson, Topeka & Santa Fey Ry Co.*, 387 U.S. 397, 416 (1967) (agencies do not "establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy"); *NBC v. United States*, 319 U.S. 190, 225 (1943) (the Commission cannot retain a rule "[i]f time and changing circumstances reveal that the 'public interest' is not served by application of the Regulation[]"); *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (an agency must "evaluate its policies over time to ascertain whether they work – that is, whether they actually produce the benefits the Commission originally predicted they would") (quoting *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992)); *see also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981) ("The Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully.").

[26] *Bechtel*, 957 F.2d at 881.

[27] *Id.* (quoting *WHHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981).

[28] *Columbia Broad. Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973).

obligation under the Administrative Procedure Act) to modify or eliminate the national cap if marketplace developments so warrant. Rather, the CAA merely directed the Commission to revise its then-existing rule setting a 45 percent cap by lowering that cap to 39 percent; while also removing the rule from the Commission's quadrennial review process. Specifically, the CAA amended the 1996 Act by directing the FCC to "modify its rules for multiple ownership" in Section 202(c)(1)(B) of that Act by striking "35 percent" and inserting "39 percent."[29] The CAA also amended Section 202(h) of the 1996 Act to specify that the requirement to conduct a quadrennial review of the Commission's broadcast ownership rules "does not apply to any rules relating to the 39 percent audience reach limitation."[30]

Contrary to the contentions of those who believe the CAA enshrined a national cap limit at 39 percent, nowhere in the CAA, or in any statute adopted before or thereafter, did Congress indicate that it was stripping the Commission of its authority to modify or eliminate the national cap rule. Rather, Congress simply removed the requirement that the Commission examine the cap in the specific context of quadrennial reviews. Eliminating the Commission's obligation to review the national cap from the quadrennial review is a far cry from establishing that Congress is the sole arbiter for setting the national cap threshold.[31]

Congress clearly "could have foreclosed the Commission from ever revising the national

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[29] CAA §§ 629(1).

[30] *Id.* at § 629(3).

[31] *See e.g., Revised Comments of the Attorneys General of the States of Illinois, California, Iowa, Maine, Massachusetts, Pennsylvania, Rhode Island, and Virginia,* MB Docket 17-318 (filed Feb. 27, 2018). In their recently filed comments, the Attorneys General incongruently assert that the Commission has no authority to modify the rule, but that it does have authority to modify how the rule is calculated. Under the plain language of the CAA, the Commission has authority to review all aspects of the rule or no aspects of the rule, not just the portions of the rule that a commenter deems worthy of review.

audience reach cap" by codifying the level of the cap in the Communications Act "or by otherwise withdrawing Commission authority to modify the cap,"[32] but it did not. "This omission is especially significant"[33] given that the Communications Act is replete with provisions that expressly prohibit the FCC from taking particular actions.[34] Indeed, "where Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[35]

Here, Congress placed no such restrictions on the Commission's authority – neither amending the Communications Act to embed the 39 percent cap nor otherwise precluding the FCC

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[32] *UHF Discount Elimination Order*, 31 FCC Rcd at 10224, ¶ 23; *see Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-77 (1994) (finding that "Congress knew how to impose aiding and abetting liability when it chose to do so," it did not use the words "aid" and "abet" in the statute at issue and, accordingly, did not impose aiding and abetting liability); *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) ("Congress ... demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and ... the language used to define the remedies under RCRA does not provide that remedy."); *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 302 (2003) (when Congress has intended to create exceptions to bankruptcy law requirements, "it has done so clearly and expressly"); *Whitfield v. United States*, 543 U.S. 209, 216 (2005) ("Congress has included an express overt-act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so.")

[33] *Fertilizer Institute v. EPA*, 935 F.3d 1303, 1310 (D.C. Cir. 1991) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

[34] *See, e.g.*, 47 U.S.C. § 152(b) (prohibiting the FCC from regulating intrastate telecommunications service); *id.* § 160(d) (the FCC generally "may not forbear from applying the requirements of section 251(c) or 271 under [section 10(a)] until it determines that those requirements have been fully implemented"); *id.* § 271(d)(4) ("The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in [section 271(c)(2)(B)]."); *id.* § 332(c)(1)(A) (the FCC may not forbear from applying any provision of section 201, 202, or 208 to commercial mobile services).

[35] *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello*, 464 U.S. at 23); *see Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) ("A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.").

from revisiting the cap in the future. Thus, there is no indication that Congress's decision to remove the national cap from the quadrennial review altered the Commission's preexisting authority under the Communications Act, or its obligation under the Administrative Procedure Act, to reconsider and revise its own rules.

Moreover, Congress used the same language in the CAA as it did when directing the FCC to modify the national cap from 25 percent to 35 percent in the 1996 Act. In both cases, Congress simply instructed the Commission to "modify its rules" to reflect a new limitation.[36] In the case of the 1996 Act, the Commission interpreted the language as preserving its authority to modify the cap in the future.[37] Congress was, therefore, on notice of how the Commission had interpreted the identical "modify its rules" language when drafting the CAA, and it chose to use the very same language again with that understanding. If Congress had intended for the CAA to categorically prohibit the Commission from adjusting the national cap, it is reasonable to assume that it would have selected language that differed from that which the Commission found created no such prohibition.[38]

In finding that it has the authority to modify the national cap, the Commission noted in the

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[36] CAA § 629 (directing the Commission to "modify its rules for multiple ownership" in section 202(c)(1)(B) by striking "35 percent" and inserting "39 percent"); 1996 Act § 202(c)(1) (stating that the Commission "shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations").

[37] *1998 Biennial Review Order*, 15 FCC Rcd at 11072, ¶ 25 (finding that it might alter the cap if market conditions justified a change); *2002 Biennial Review Order*, 18 FCC Rcd at 13818, ¶ 507 (adjusting the cap to account for changed market conditions).

[38] *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 343, 382 n.66 (1982) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change."); *Lorillard*, 434 U.S. at 581 (if Congress incorporates sections of an earlier statute into a new one, "Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law").

UHF Discount Elimination Order that "no statute," including the CAA, "bars the Commission from revisiting the cap" outside of the quadrennial review process.[39] Given the text and structure of the Communications Act, the Commission's mandate to account for evolving market conditions in the media environment, and the clear language of the CAA, there is no basis for the Commission to reach a different conclusion here.

IV. THE COMMISSION SHOULD REPEAL THE NATIONAL CAP RULE IN ITS ENTIRETY.

A. There Is No Rational Basis to Disturb the Long-Held Conclusion that a National Cap Is Not Necessary to Promote Competition or Diversity.

The NPRM recognizes that "the Commission previously has found that a national television ownership restriction is not necessary to promote the goals of competition or diversity," and asks whether these conclusions are still valid.[40] The answer is a resounding yes, they are. The media marketplace has been transformed, reaffirming that there can be no diversity or competition-based rationale for a national cap rule.

1. Since 1984, the Commission and Courts Have Consistently Determined the National Cap Is Not Necessary to Promote Diversity or Competition.

In 1984, the Commission first concluded that a national television ownership limitation was unnecessary, and only delayed a formal sunset of its existing limit for six years as a safeguard against unforeseen negative developments.[41] In that proceeding, the Commission fully considered whether a cap was necessary to protect diversity or competition and answered those questions

[39] *UHF Discount Elimination Order*, 31 FCC Rcd at 10222, ¶ 21.

[40] *NPRM*, ¶ 16 (citing *2002 Biennial Review Order*, 18 FCC Rcd at 13818-19, 13827, 13842, ¶¶ 508-09, 535, 578; *1984 Multiple Ownership Order*, 100 FCC 2d at 27, 39-40, ¶¶ 31-32, 67-71).

[41] *See generally 1984 Multiple Ownership Order*.

definitively in the negative.[42] The Commission's observations showed a remarkable degree of foresight and are even more apt today than they were when originally made.

In 1984, the "media" primarily included broadcast, cable television, newspapers, and periodicals.[43] The direct broadcast satellite ("DBS") industry was in its early stages, and less than 10 percent of Americans had computers (let alone the Internet or mobile devices) in their homes.[44] Nevertheless, the Commission recognized that a "plethora of mass media outlets" existed, providing consumers with access to "numerous alternative sources of information and entertainment."[45] Although cable television systems passed only 64% of homes nationwide and other sources of programming were admittedly "in their infancy," the Commission still found that the "number of independently owned mass media relevant to diversity of viewpoint is enormous."[46] The Commission further determined that "a national rule is irrelevant to the number of diverse viewpoints in any particular community" and that any concern over viewpoint diversity is "primarily a matter pertaining to local diversity."[47] As a result, the Commission concluded that the elimination of any restriction on national television ownership "poses no threat to the diversity of independent viewpoints in the information and entertainment markets" at either a national or

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[42] *See id.*

[43] *See id.*, 100 FCC 2d at 26, ¶ 27.

[44] *See id.*; United States Census Bureau, *Computer and Internet Use in the United States, Population Characteristics* (May 2013), https://www.census.gov/prod/2013pubs/p20-569.pdf (last visited Jan. 17, 2018) (reporting that only 8.2 percent of U.S. households owned a computer in 1984, which was the first year that the Census Bureau asked about computer ownership).

[45] *1984 Multiple Ownership Order*, 100 FCC 2d at 26, ¶ 27.

[46] *Id.* at 27, 28, ¶¶ 32, 35.

[47] *Id.* at 27, ¶ 32.

local level.[48]

As to competition, the Commission likewise determined that the potential for national ownership concentration in the television industry did not justify continued regulation. Even though it considered the relevant market as that for television advertising alone (excluding all other forms of media), the FCC found that "the fact that local competitors may share common ownership with stations in other markets is unimportant in terms of competitive harm."[49]

The Commission did not reconsider these findings until the 1998 biennial review, and then did so only in cursory fashion. Rather than seeking to justify a national audience reach cap based on competition or diversity concerns, the FCC expressed a desire to "monitor the impact" of the recent increase in the national cap and other rule changes and concern over potential changes in the balance of "bargaining positions between television networks and their affiliates."[50]

On review, the D.C. Circuit found that although the Commission had referenced national competition issues, its discussion was "wholly unsupported and undeveloped" and that, accordingly, it was logical to presume that "the Commission has no valid reason to think that the [national cap] is necessary to safeguard competition."[51] The Court similarly rejected the FCC's "passing reference" to diversity as sufficient to explain why the national audience reach cap was "necessary to further that end."[52] As a result, the D.C. Circuit found that "the Commission has adduced not a single valid reason to believe that the [national cap] is necessary in the public

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[48] *Id.* at 30-31, ¶ 43.

[49] *Id.* at 41-42, ¶ 73.

[50] *1998 Biennial Review Order*, 15 FCC Rcd at 11072-75, ¶¶ 25-30.

[51] *Fox*, 280 F.3d at 1042.

[52] *Id.*

interest, either to safeguard competition or to enhance diversity" and that retention of the rule was "arbitrary and capricious in violation of the APA."[53] On remand, the FCC conceded that a national television audience reach cap could not be justified based on competition or diversity concerns.

In 2002, the Commission acknowledged that "the media marketplace [was] undergoing unprecedented change," and that broadcasters were by that point subject to significant additional competition from both cable and DBS.[54] After examining the program production and acquisition market as well as the national advertising market, the FCC again determined that competition concerns could not justify a national cap.[55] Insofar as diversity was concerned, the Commission reaffirmed that viewpoint diversity is irrelevant to restrictions on national television ownership, and that even considering diversity on a national level, "the proliferation of media outlets nationwide" had rendered the 35 percent cap unnecessary.[56]

2. Today's Media Marketplace Is More Diverse and Competitive Than It Was in 2002.

The 2002 Biennial Review marked the last time the FCC considered the legitimacy of a national cap, and the Commission reconfirmed that neither diversity nor competition justified a national cap. It is beyond dispute that the video marketplace has changed considerably since 2002. Indeed, as Chairman Pai explained:

> During that time, the video industry has undergone revolutionary change. In particular, the rise of over-the-top video has transformed the video marketplace. For instance, Netflix, YouTube, Amazon, and Hulu all did not offer Internet video when the national cap was set at 39%. We are confronting a 39% national cap that

[53] *Id.* at 1043-44.

[54] *2002 Biennial Review Order*, 18 FCC Rcd at 13818-19, ¶ 509.

[55] *Id.* at 13818-25, ¶¶ 509-528.

[56] *Id.* at 13826-28, ¶¶ 533-537. The Commission, however, then justified retention of the cap for the purpose of protecting localism.

> the Commission itself has never justified. Indeed, the last time that the Commission reviewed the merits of the national cap it concluded that a 45% cap was justified. And we are dealing with a 39% cap that approximates the cap that the D.C. Circuit rejected over a decade ago.[57]

The days when television viewers had access to only "a few broadcast networks via rabbit ears" are relics of the now-distant past.[58] In fact, "the video marketplace has transformed dramatically" and is "now more competitive than ever,"[59] with today's media consumers having access to "literally hundreds of competitive pay TV channels and essentially unlimited competitive Internet content."[60] Moreover, today consumers can access this content not just on their television sets – their only real option when the current 39 percent national audience reach cap was adopted – but also on computers and mobile devices that empower the consumption of information whenever, and wherever, they want it.[61]

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[57] *See UHF Discount Elimination Order*, 13 FCC Rcd at 10249, Dissenting Statement of Commissioner Ajit Pai.

[58] *2014 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996; 2010 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Pursuant to Section 202 of the Telecommunications Act of 1996; Promoting Diversification of Ownership In the Broadcasting Services; Rules and Policies Concerning Attribution of Joint Sales Agreements in Local Television Markets*, Second Report and Order, 31 FCC Rcd 9864, 10060 (2016) ("*2016 Quadrennial Review Order*"), Dissenting Statement of Commissioner Michael O'Rielly ("*O'Rielly Quadrennial Review Dissent*").

[59] *Id.* at 10045, Dissenting Statement of Commissioner Ajit Pai ("*Pai Quadrennial Review Dissent*").

[60] *O'Rielly Quadrennial Review Dissent* at 10060.

[61] Nexstar and others have documented these dramatic marketplace changes in many Commission proceedings over the years. *See, e.g.*, Petition for Reconsideration of Nexstar Broadcasting, Inc., MB Docket Nos. 14-50, *et al.*, at 4-6 (Dec. 1, 2016); Petition for Reconsideration of the National Association of Broadcasters, MB Docket Nos. 14-50, *et al.*, at 1-4 (Dec. 1, 2016); NAB Ex Parte, MB Docket Nos. 14-50 *et al.*, at 2 (Aug. 25, 2016) ("*NAB Aug. 26 Ex Parte*"); Comments of Nexstar Broadcasting, Inc., MB Docket Nos. 14-50 *et al.*, at 5-7 (Aug. 6, 2014) ("*Nexstar 2014 QR Comments*"); Comments of the National Association of Broadcasters, MB Docket Nos. 14-50 *et al.*, at 9-38 (Aug. 6, 2014); Comments of the Coalition of Smaller Market Television Stations,

New sources of video content are not just available to consumers; they are considered to be as helpful, or more helpful, than traditional media. Indeed, a recent Pew Research Center study confirms that sources other than local television news continue to grow in importance. Pew studies conducted in August 2017 demonstrated that 93 percent of Americans get news online, and that 67 percent get at least some of their news on social media.[62] In fact, "the Wall Street Journal recently dubbed Facebook 'the most powerful distributor of news and information on Earth.'"[63]

There also can be no doubt that consumers have multitudes of options at their disposal for information and entertainment. As of the end of 2015, most consumers had access to three competing multichannel video programming distributors ("MVPDs") and some had access to four.[64] The major MVPDs "offer hundreds of linear television channels, thousands of non-linear VOD [or video-on-demand] programs, as well as pay-per view (PPV) programs," and also "use the Internet to deliver video programming to personal computers, tablets, and mobile devices."[65]

MB Docket Nos. 14-50 *et al.*, at 1, 6 (filed Aug. 6, 2014); Comments of Fox Entertainment Group and Fox Television Holdings, Inc., MB Docket No. 09-182, at 7-15 (Mar. 5, 2012), *attached to* Letter from the Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., MB Docket No. 14-50 (Aug. 6, 2014); Nexstar Broadcasting, Inc. Ex Parte, MB Docket Nos. 14-50, *et al.*, at 10-12 (Mar. 14, 2014) ("*Nexstar Mar. 2014 Ex Parte*").

[62] *See* Elisa Shearer, *et al.*, *News Use Across Social Media Platforms*, Pew Research Center, Journalism & Media (Sept. 7, 2017), http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/; Galen Stocking, *Digital News Fact Sheet*, Pew Research Center, Journalism & Media (Aug. 7, 2017), http://www.journalism.org/fact-sheet/digital-news/.

[63] *Who Will Rein in Facebook? Challengers Are Lining Up*, Christopher Mims, The Wall Street Journal (Oct. 29, 2017), https://www.wsj.com/articles/who-will-rein-in-facebook-challengers-are-lining-up-1509278405?mod=searchresults&page=1&pos=1).

[64] *Annual Assessment of the Status of Competition in the Market for the Delivery for Video Programming*, Eighteenth Report, 32 FCC Rcd 568, 570, 576, ¶¶ 3, 21, Table III.A.2 (2017) ("*18th Video Competition Report*").

[65] *Id.* at 574, 591-92, ¶¶ 17, 55-60.

DBS is considered to be available to every household in America, cable is available to more than 99 percent of U.S. households, and telephone company MVPDs are available to almost 40 percent of such households.[66] Vertical integration among MVPDs and national programming networks has increased, with 159 national networks vertically integrated with the top six MVPDs.[67]

Beyond broadcasting, cable, and other MVPDs, non-traditional sources of information and entertainment abound and continue to grow in terms of availability and popularity. Many of these sources are Internet-based and are therefore available nationwide to anyone with a broadband connection, including on mobile wireless devices. Online video distributors ("OVDs") have continued to experience gains; by the end of 2016, an estimated 65 million homes subscribed to an OVD service, with those homes collectively purchasing 109 million separate subscriptions.[68] Companies operating in this space include Netflix, Amazon, Apple, Google/YouTube, Sony, and Hulu, as well as the major television networks and major sports leagues.[69] Moreover, the formal OVD marketplace presents just the tip of the iceberg in terms of video programming options available online because today any individual or company with a website and a video camera can

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[66] *Id.* at 575, ¶ 20, Table III.A.1.

[67] *Id.* at 577-78, ¶ 24; *see id.* at Appendix B, Table B-1, Appendix C, Table C-1, Appendix D. Specifically, as if the end of 2015, Comcast had ownership interests in 52 national networks, Charter Communications had ownership interests in 30 national networks, and Cox had ownership interests in six national networks. *Id.* at 578, ¶ 24.

[68] *Id.* at 620, 640, ¶¶ 131, 180 (citing SNL Kagan, State of Online Video Delivery at 8 (2016)). The 65 million figure is an increase from 59.4 million in 2015. *See id.* ¶ 178 (citing SNL Kagan, State of Online Video Delivery at 6 (2016)). OVD content is available "a variety of Internet-connected devices including television sets, DVD and Blu-ray players, game consoles, computers, smartphones, tablets, and streaming devices (e.g., Roku, Apple TV, Google Chromecast, and Amazon Fire TV)." *Id.* at 627-28, ¶ 146 (citing SNL Kagan, State of Online Video Delivery at 10 (2016)).

[69] *Id.* at 621, ¶ 132.

produce programming and make it available to the entire universe of Internet users. The importance of the Internet as a source of information and entertainment cannot be overstated and has been repeatedly acknowledged by the Commission and others.[70] And the Internet is nearly ubiquitous; by the end of 2016, approximately 90 percent of American adults reported using the Internet, including approximately 99 percent of Americans between 18 and 29 and 96 percent of those between 30 and 49.[71]

These new media sources do not just compete with television broadcasting for viewers, they do so for advertising dollars as well. The FCC has found that broadcast stations' share of the total national advertising market was only 4.4 percent in 2015.[72] By contrast, digital ad revenues (including Internet and mobile) accounted for 21.9 percent of the national advertising market, and cable networks and VOD accounted for 18.3 percent.[73]

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[70] *See, e.g.*, *Internet/Broadband Fact Sheet*, Pew Research Center (Jan. 12, 2017), http://www.pewinternet.org/fact-sheet/internet-broadband/ ("The [I]nternet represents a fundamental shift in how Americans connect with one another, gather information and conduct their day-to-day lives."); Chairman Pai Statement on Draft 2018 Broadband Deployment Report ("[T]he FCC's top priority under my leadership remains bridging the digital divide and bringing digital opportunity to all Americans."); *Restoring Internet Freedom*, WC Docket No. 17-108, FCC 17-166, ¶ 60 (rel. Jan. 4, 2018) (recognizing the importance of the Internet to "foster[ing] economic competition, technological innovation, and free expression"); *Protecting and Promoting the Open Internet*, Order, 25 FCC Rcd 17905, 17912, ¶ 15 (2010) (describing the Internet as an "unrivaled forum for free expression"); Comments of Free Press, GN Docket No. 09-191, at 9 (Jan. 14, 2010) (noting the unlimited number of "channels" provided by the Internet); Comments of Common Cause, GN Docket No. 14-27, at 3, 5 (July 15, 2014) (referring to the Internet as "the 21st century public square" that is a "laboratory for social innovation and political discourse," and that is "filling in gaps in local and diverse niche topics," and "cultivating new forms of storytelling via video, crowdsourcing, and new visualizations, styles, and means to connect with viewers").

[71] *Internet/Broadband Fact Sheet*, Pew Research Center (Jan. 12, 2017), http://www.pewinternet.org/fact-sheet/internet-broadband/.

[72] *18th Video Competition Report*, 32 FCC Rcd at 616, ¶ 122.

[73] *Id.* at 618, Table III.B.6. Although local advertising revenues should not be relevant to the analysis here because a national audience reach limit necessarily would address only national advertising competition, broadcasting's share of local advertising revenue has also continued to

It is not surprising, then, that broadcasters' competitors in the media industry dwarf them in terms of overall size. For example, Alphabet (the parent company of Google and YouTube) has a market cap of $800 billion, Facebook's is $539 billion, and Comcast/NBC's is $168 billion.[74] Nexstar's by comparison, is a mere $3.2 billion.[75] Yet, television broadcasters are uniquely singled out and subject to an arbitrary, and therefore unlawful, 39 percent cap on the percentage of American households that they can reach with their programming.[76]

To say, in the face of the multitudes of choices available to consumers and advertisers today, that a national television audience reach cap is necessary to protect diversity or competition

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shrink in recent years. Based on data supplied by BIA/Kelsey, over-the-air broadcasting accounted for only 14.2 percent of the total spending on local advertising in 2016, and that figure is predicted to drop to 13.8 percent in 2018. *See* BIA/Kelsey, Nationwide Overview, Local Revenue ($Millions) by Media, 2015-2019 Market (on file with commenter); BIA/Kelsey Forecasts U.S. Local Advertising Revenue to Increase 5.2% Percent in 2018 to $151.2B (Dec. 6, 2017), http://www.biakelsey.com/biakelsey-forecasts-u-s-local-advertising-revenues-increase-5-2-percent-2018-151-2b-largest-annual-increase-five-years/.

[74] *See* Bloomberg Markets, GOOG:US Alphabet Inc. (Mar. 15, 2018), https://www.bloomberg.com/quote/GOOG:US; Bloomberg Markets, FB:US Facebook Inc (Mar. 15, 2018), https://www.bloomberg.com/quote/FB:US; Bloomberg Markets, CMCSA:US, Comcast Corp (Mar. 15, 2018), https://www.bloomberg.com/quote/CMCSA:US.

[75] *See* Bloomberg Markets, NXST:US, Nexstar Media Group, Inc., https://www.bloomberg.com/quote/NXST:US. Other pure-play broadcasters have similar, or lower, market caps. For example, Sinclair's market cap is $3.3 billion, Tribune's is $3.6 billion, TEGNA's is $2.7 billion, and Gray's is $1.2 billion. *See* Bloomberg Markets, SBGI:US, Sinclair Broadcast Group Inc., https://www.bloomberg.com/quote/SBGI:US; Bloomberg Markets, TRCO:US, Tribune Media Co., https://www.bloomberg.com/quote/TRCO:US; Bloomberg Markets, TGNA:US, TEGNA Inc, https://www.bloomberg.com/quote/TGNA:US; Bloomberg Markets, GTN:US, Gray Television Inc., https://www.bloomberg.com/quote/GTN:US (each as of Mar. 15, 2018).

[76] It is settled law that disparate treatment of similarly situated parties violates the Administrative Procedure Act. *See, e.g.*, *Indep. Petrol. Ass'n v. Babbitt*, 92 F.3d 1248, 1260 (D.C. Cir. 1996); *McElroy Elec. Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993); *Melody Music v. FCC*, 345 F.2d 730, 732-33 (D.C. Cir. 1965).

is plainly illogical.[77] It is even more so given the Commission's directly contradictory findings thirty-four years ago, when almost none of the choices now available to consumers were available, and the majority could not even have been imagined.[78] To the extent the FCC might wish to reverse course regarding the absence of any competition- or diversity-based rational for a national audience reach cap, it must explain "why it is reasonable to do so," which it simply cannot do.[79]

B. Maintaining a National Cap Harms Rather Than Promotes Localism, and Impedes Innovation.

Although the Commission previously determined that concerns related to localism support a national cap, those determinations no longer justify retention of a limit on broadcasters' reach. As the NPRM acknowledges, the Commission "has not found the cap necessary to encourage stations to air local news and public affairs programming,"[80] which is its typical localism concern. To the contrary, the Commission found exactly the opposite, recognizing that the record before it in 2002 suggested "that the national cap diminishes localism by restraining the most effective

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[77] The D.C. Circuit reached the identical conclusion in vacating a 30 percent limit on the number of subscribers that a cable operator could serve, finding that "[i]n view of the overwhelming evidence concerning 'the dynamic nature of the communications marketplace, . . . and the entry of new competitors at both the programming and distribution levels, it was arbitrary and capricious for the Commission to conclude that a cable operator serving more than 30% of the market poses a threat either to competition or to diversity in programming." *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009). The cable limit vacated in *Comcast* was based upon actual subscribers rather than potential reach and, accordingly, was less restrictive than the television audience cap. *See Fox*, 280 F.3d at 1041.

[78] *See supra* Section IV.A.1.

[79] *Fox*, 280 F.3d at 1044; *see, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009); *CBS Corp. v. FCC*, 663 F.3d 122, 151-52 (3d Cir. 2011); *see also Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) ("An agency's failure to come to grips with conflicting precedent constitutes 'an inexcusable departure from the essential requirement of reasoned decision making.'") (quoting *Columbia Broad. Sys. v. FCC*, 454 F.2d 1018, 1027 (D.C. Cir. 1971)).

[80] *NPRM*, ¶ 12 n.47 (citing *2002 Biennial Review Order*, 18 FCC Rcd at 13841-42, ¶ 575).

purveyors of local news from using their resources in additional markets."[81] The FCC's sole localism-based rationale for the cap has been its view that some limit on television station ownership by the national networks is essential to ensure that local affiliates could influence network programming content and exercise their rights to preempt network programming.[82] To the extent that the FCC has lingering concerns regarding the balance of power in network-affiliate relationships, such concerns are better addressed directly, rather than indirectly through the obliquely-connected and overly-restrictive mechanism of a national audience reach cap.

More importantly, it is clear that a national cap does more harm than good by preventing broadcasters from reaching their full potential. When the Commission decided to set the cap at 45 percent fifteen years ago, it recognized that even by that time additional economies of scale and scope were necessary to permit group owners to remain competitive given the increasing availability and popularity of non-broadcast media.[83] As documented above, in the intervening decade-and-a-half, the range of other sources of information and entertainment with which broadcasters compete has continued to expand at an overwhelming rate. Continuing to single broadcasters out for regulation serves only to hamper their ability to develop and air programming that is suited to meet the unique needs and interests of their local communities, and is thus inconsistent with the basic dictate of rational decision-making that an agency cannot "employ means that actually undercut its own purported goals."[84]

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[81] *2002 Biennial Review Order*, 18 FCC Rcd at 13841-42, ¶ 575.

[82] *NPRM*, ¶ 12 (citing *2002 Biennial Review Order*, 18 FCC Rcd at 13842-43, ¶¶ 578-81; *1998 Biennial Review Order*, 15 FCC Rcd at 11074-75, ¶ 30; *1985 UHF Discount Order*, 100 FCC 2d at 87-92, ¶¶ 30-41).

[83] *2002 Biennial Review Order*, 18 FCC Rcd at 13844, ¶ 583.

[84] *Office of Commc'n of United Church of Christ v. FCC*, 779 F.2d 702, 707 (D.C. Cir. 1985).

Moreover, serving local interests is not only broadcasters' public interest duty,[85] but is also something that they have every incentive to do in order to differentiate themselves in an increasingly fragmented media marketplace.[86] That is, television stations' coverage of local news, local sports, local emergencies, local lifestyle issues, and all other local programming is what drives viewers and local advertisers to stations in the ever-expanding sea of media choice. Furthermore, there is no evidence that smaller station groups serve local communities better than larger ones.[87] Permitting broadcasters to achieve additional economies of scale and scope will enable them to funnel more resources into addressing local interests and bolster their success,

[85] *See NPRM*, ¶ 14 n.50 (citing *2002 Biennial Review Order*, 18 FCC Rcd at 13642, ¶ 74). Nexstar and other broadcasters have extensively documented their commitments to serving local communities in numerous Commission proceedings. *See, e.g.*, Comments of Nexstar Broadcasting Group, L.L.C. and Quorum Broadcast Holdings, LLC, MB Docket No. 02-277 *et al.* (Jan. 2, 2003); Reply Comments of Nexstar Broadcasting Group, L.L.C. and Quorum Broadcast Holdings, LLC, MB Docket No. 02-277 *et al.* (Feb. 3, 2003); Comments of Nexstar Broadcasting, Inc., MB Docket 04-256 (Oct. 24, 2004); Comments of Nexstar Broadcasting, Inc., MB Docket No. 06-121 *et al.* (Oct. 23, 2006); Reply Comments of Nexstar Broadcasting, Inc., MB Docket No. 06-121 *et al.* (Jan. 16, 2007); Comments of Nexstar Broadcasting, Inc., GN Docket No. 10-25 (May 7, 2010); Comments of Nexstar Broadcasting, Inc., MB Docket No. 09-182 (July 12, 2010); Reply Comments of Nexstar Broadcasting, Inc., MB Docket No. 09-182 (July 26, 2010); Comments of Nexstar Broadcasting, Inc., MB Docket Nos. 09-182 and 07-294 (Mar. 5, 2012); Reply Comments of Nexstar Broadcasting, Inc., MB Docket Nos. 09-182 and 07-294 (Apr. 17, 2012); Notice of Ex Parte Communications on behalf of Nexstar Broadcasting, Inc. and Mission Broadcasting, Inc., MB Docket No. 09-182 (Jan. 16, 2013); Written Ex Parte Presentation of Nexstar Broadcasting, Inc., MB Docket No. 09-182 (Jan. 24, 2013); Written Ex Parte Presentation of Nexstar Broadcasting, Inc., MB Docket No. 09-182 (Feb. 20, 2014); *Nexstar Mar. 2014 Ex Parte*; *Nexstar 2014 QR Comments* (including excerpts from previous filings in Exhibit A).

[86] *See, e.g.*, Kathy Haley, *Groups Likely to Expand Program Production*, TVNewsCheck (Jan. 19, 2018), http://www.tvnewscheck.com/article/110491/groups-likely-to-expand-program-production; Jason Heid, *Breakfast With: Perry Sook of Nexstar Broadcasting*, Dallas Magazine (March 2013), https://www.dmagazine.com/publications/d-ceo/2013/march/breakfast-with-perry-sook-of-nexstar-broadcasting/.

[87] The Commission reached this conclusion in 1984, *see 1984 Multiple Ownership Order*, 100 FCC 2d at 35, ¶ 53, and the same is true today.

thereby enhancing localism (as well as competition and diversity).[88] In contrast, retaining a national cap hinders broadcasters' ability to innovate and offer new programs and services. Broadcasters have every incentive to put the economic efficiencies that flow from greater scale to use serving local communities by, for example, creating state-wide news bureaus that would not otherwise be possible[89] and investing in new programs and services through use of the newly-authorized ATSC 3.0 standard.[90] Repeal of the national audience reach cap would thus promote

[88] Indeed, as new media alternatives succeed in shifting consumer attention away from local television stations, those stations' advertising revenues, and concomitantly their ability to produce high-quality local programming, suffers. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 30 FCC Rcd 3253, *44 n.545 (¶ 141 n.545) (2015) ("Advertisers and audiences are mutually dependent. Television stations need to attract audiences in order to earn money from advertising. They need advertising revenues in order to make investments in programming that will attract audiences.") (citing David S. Evans & Richard Schmalensee, The Industrial Organization of Markets with Two-Sided Platforms, COMPETITION POL'Y INT'L 151, 155-56 (2007)); Jeffrey A. Eisenach and Kevin W. Caves, *The Effects of Regulation on Economies of Scale and Scope in Broadcasting*, at 2 (June 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1894941 (noting that "market fragmentation has reduced broadcasters' revenues and made it difficult or impossible to defray fixed costs based solely on traditional advertising").

[89] For example, Nexstar has established state-wide news bureaus in 19 of the 38 states in which it operates (Alabama, Arkansas, California, Connecticut, Indiana, Illinois, Iowa, Kansas, Louisiana, Massachusetts, Michigan, New York, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia and West Virginia; Georgia will launch in 2018) which enable sharing of state political issues and matters of regional interest across Nexstar's stations in the applicable states. Nexstar also has a Washington, D.C. news bureau that provides custom coverage of national news to its 100 markets. For example, after the 2018 State of the Union address, Nexstar's D.C. news bureau was able to interview 51 Senators and Representatives (and an additional 24 immediately prior to the address). In addition, reporters from the D.C. bureau were invited to the Oval Office the following day to meet with the President regarding the address. Allowing Nexstar to increase its audience reach would permit the establishment of additional state-wide news bureaus serving other areas and provide its national capital service to additional markets.

[90] A small handful of station groups have launched ATSC 3.0 trials. *See* Mark Miller, ATSC 3.0 SFN to Be Deployed in Dallas, TVNEWSCHECK (Jan. 18, 2018), *available at* http://www.tvnewscheck.com/article/110471/atsc-30-sfn-to-be-deployed-in-dallas; Phil Kurz, Phoenix to Serve as 'Model Market' for ATSC 3.0, TVTECHNOLOGY (Nov. 15, 2017), *available at* http://www.tvtechnology.com/atsc3/0031/phoenix-to-serve-as-model-market-for-atsc-30/282269; Capitol Broadcasting Launches ATSC 3.0 Television Station, *available at* https://www.atsc.org/newsletter/capitol-broadcasting-launches-atsc-3-0-television-station/.

both localism and innovation.

V. CONCLUSION.

As the Commission observed in 1984, "we would be derelict in our responsibilities to the public interest were we to ignore the developments now occurring, and those evidently on the way."[91] The same is even more true today, given the overwhelming shift in Americans' media consumption habits. For these reasons, the Commission should eliminate the national cap in its entirety.

Respectfully submitted,

By: /s/ Richard J. Bodorff

Richard J. Bodorff
Eve Klindera Reed
Gregory L. Masters
Shawn Donovan
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
202.719.7000

Elizabeth Ryder
Executive Vice President & General Counsel
Nexstar Broadcasting, Inc.
545 E. John Carpenter Freeway
Suite 700
Irving, TX 75062

Counsel for Nexstar Broadcasting, Inc.

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[91] *1984 Multiple Ownership Order*, 100 FCC 2d at 30, ¶ 40.